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# ON MORALS, PRIVACY, AND THE CONSTITUTION

ARDEN DOSS JR.* AND DIANE KAY DOSS**



## I. INTRODUCTION

A personal sanctuary impervious to unreasonable governmental intrusion is guaranteed every citizen by the Bill of Rights.[1] With the exception of first amendment freedoms, the broad contours of this sphere of liberty have evolved primarily in the context of criminal procedure. Fourth amendment rules of "search and seizure,"[2] fifth amendment guidelines for police-suspect confrontations,[3] and the right to representation by competent counsel[4] have become fundamental to state and federal criminal process. Underlying these procedural prescriptions is a fundamental "right to privacy, no less important than any other right carefully and particularly reserved to the people."[5]

While the influence of the privacy doctrine on criminal procedure has been far-reaching,[6] its inroad into substantive criminal law is proving even more decisive, engendering a constitutional challenge to laws punishing "crimes of morality." Outside the context of procedural due process, however, the right of privacy has never been expressly defined in terms sufficient to permit any reasonable prediction as to what activi-

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1. The Poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail—its roof may shake—the wind may blow through it—the storm may enter, the rain may enter—but the King of England cannot enter . . . Frank v. Maryland, 359 U.S. 360, 378-79 (1959) (quoting William Pitt).

2. *See, e.g.*, Chimel v. California, 395 U.S. 752 (1969); Alderman v. United States, 394 U.S. 165 (1969); Katz v. United States, 389 U.S. 347 (1967).

3. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964).

4. *See, e.g.*, Anders v. California, 386 U.S. 738 (1967); Gideon v. Wainwright, 372 U.S. 335 (1963).

5. Mapp v. Ohio, 367 U.S. 643, 656 (1961). Even before the turn of the century, it was recognized that the fourth and the fifth amendments "apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life." Boyd v. United States, 116 U.S. 616, 630 (1886).

6. Beaney, *The Constitutional Right to Privacy in the Supreme Court*, 1962 SUP. CT. REV. 212.

ties will be protected by its constitutional shield.[7] The possible philosophical assumptions which underly the right have been only sparsely theorized, and the basis for measuring the appropriate balance between the individual's right of privacy and the right of government to intrude upon that privacy remains unstated. Through the integration of old philosophies and new judicial decisions, this missing dialogue may be synthesized, and the resulting privacy doctrines may be applicable to some of our most publicized social phenomena.

## II. The Philosophy of Privacy

The moral laws which denominate sin and immorality reach into the very soul of the individual, judging and punishing a man's inner thoughts and emotions as well as his deeds.[8] Moral laws, historically intertwined with religion—which in Western culture embodies an omniscient and omnipotent deity—so totally encompass the individual that their reconciliation with individual privacy is conceptually impossible. The moral code governs the most private of acts and the most public of deeds.

Because the state is neither omniscient nor omnipotent, a realm of individual conduct can be put beyond the state's knowledge and power. Thus, the concept of privacy arises from the proposition that the reach of civil and criminal laws should not be co-extensive with moral laws; rather, there should be a realm of individual thought and action—a zone of privacy—beyond the law.[9]

Sinful and immoral conduct, such as murder, rape, or theft, may inflict immediate physical, psychological or economic injury. On the other hand, sinful conduct may produce no discernible damage, as may be the case with blasphemous thoughts, the possession of obscene material, or an occasional incident of sodomy with one's wife. The philosophical controversy over the right of privacy centers on whether specific conduct does produce discernible injuries, and if not, whether such conduct may nonetheless incur criminal penalties because of its sinful or immoral

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7. McKay, *The Right of Privacy: Emanations and Intimations*, 64 Mich. L. Rev. 259 (1965); Dixon, *The Griswold Penumbra; Constitutional Charter for an Expanded Law of Privacy?* 64 Mich. L. Rev. 197 (1965).

In the law of torts, the right of privacy was first formulated by Brandeis and Warren, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890).

8. "You shall not kill . . . commit adultery . . . steal . . ."; "You shall not covet your neighbor's house; you shall not covet your neighbor's wife, or his manservant, or his maidservant, or his ox, or his ass, or anything that is your neighbor's." *Exodus* 20:13-15, 17.

9. "The concept of limited government has always included the idea that governmental powers stop short of certain intrusions into the personal life of the citizen." Emerson, *Nine Justices in Search of a Doctrine*, 64 Mich. L. Rev. 219, 229 (1965). The connection between law and morals, however, has often been discussed without any reference to individual privacy. *Compare* Hart, *Positivism and the Separation of Law and Morals*, 71 Harv. L. Rev. 593 (1958) *with* Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 Harv. L. Rev. 630 (1958).

character. Birth control,[10] sodomy,[11] homosexual activity,[12] possession of peyote,[13] possession of marijuana,[14] possession of LSD,[15] and possession of pornographic materials[16] are all arguably "crimes of morality," which have engendered much litigation and literary comment.

Views as to the proper connection between law and morals are typically allocated into two primary divisions: the "moralists," represented by Sir Patrick Arthur Devlin, and the "Utilitarians," represented by Jeremy Bentham.[17] This division, while valid for many purposes, actually obscures more than it illuminates; for, as will be seen, with respect to limitations on the right of government to control the individual, Devlin and Bentham simply state the same principle in different terms.

Believing that Christian morals are an integral part of the social community, Lord Devlin argues that "morality is necessary to society" and must be supported by "the use of those instruments without which morality cannot be maintained." These instruments include teaching, which is doctrine, and "enforcement, which is law."[18] The morality preservable by community law is akin to public sentiment. For example, concerning homosexual activity, Devlin concludes:

> We should ask ourselves in the first instance whether, looking at it calmly and dispassionately, we regard it as a vice so abominable that its mere presence is an offense. If that is the genuine

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10. Griswold v. Connecticut, 381 U.S. 479 (1965); Tileston v. Ullman, 318 U.S. 44 (1943); Comment, *Connecticut's Birth Control Law: Reviewing a State Statute Under the Fourteenth Amendment*, 70 YALE L.J. 322 (1960). For a refreshing sense of humor in this connection see also Note, *Man, His Dog and Birth Control: A Study in Comparative Rights*, 70 YALE L.J. 1205 (1961).

11. *See, e.g.*, Hollis, *Criminal Law—Sexual Offences—Sodomy—Cunnilingus*, 8 NATURAL RESOURCES J. 531 (1968); Johnsen, *Sodomy Statutes—A Need for Change*, 13 S.D.L. REV. 384 (1968); Note, *Sodomy—Crime or Sin?*, 12 U. FLA. L. REV. 83 (1959).

12. Smayda v. United States, 352 F.2d 251 (9th Cir. 1965). This case also learnedly discusses the privacy of a public toilet stall.

13. State v. Bullard, 267 N.C. 599, 148 S.E.2d 565 (1966); Note, *Constitutional Law: Use of Peyote as a Free Exercise of Religion*, 19 U. FLA. L. REV. 377 (1966).

14. Eckroth v. Florida, 227 So.2d 313, 314 (Fla. 2d Dist. 1969), *rev'd*, 238 So.2d 75 (Fla. 1970), deciding whether a person

> who receives from another, a pipe of marijuana belonging to that other person for the mere purpose of taking a drag or puff therefrom and then returning said pipe via passing it on around the circle is guilty of unlawful "possession or control" of a narcotic drug.

15. Rosborough, *LSD: A Challenge to American Drug Law Philosophy*, 19 U. FLA. L. REV. 311 (1966).

16. State v. Mapp, 170 Ohio St. 427, 166 N.E.2d 387 (1960), *rev'd on other grounds*, 367 U.S. 643 (1961).

17. The philosophies of Devlin and Bentham are explored at length, with emphasis on the contrast of their views as opposed to the similarities of the views, in Comment, *Morals and the Criminal Law*, 71 YALE L.J. 662 (1962).

18. P. DEVLIN, THE ENFORCEMENT OF MORALS 25 (1st ed. 1959) [hereinafter cited as *Devlin*]. *Cf.* Rostow, *The Enforcement of Morals*, 1960 CAMB. L.J. 174, 197, in which it is said: "Men often say one cannot legislate morality. I should say that we legislate hardly anything else."

> feeling of the society in which we live, I do not see how society can be denied the right to eradicate it.[19]

The enforcement of morals is, in Devlin's terms, little more than the use of law to provide "psychic fulfillment" to the community body. If homosexual conduct, like a bad odor, is psychologically revolting, the community may apply its most fearsome sanctions to cleanse the irritant.

The principle that criminal laws may and should enforce community morality so as to maximize the psychic pleasures of the community body reduces into merely a sub-theorem of Bentham's utilitarian principle that "all human action is to be scrutinized against the criterion of its tendency to produce pleasure or pain and judged by the final balance in the pleasure-pain ledger. . . ."[20] The laws of government are to be based on a single communal judgment: "That which is conformable to the utility, or the interest of the community, is what tends to augment the total sum of the happiness of the individuals that compose it."[21] The enforcement of moral laws based on Devlin's community psyche is within this utility principle, because to Bentham pleasure includes emotional enrichment, such as the psychic satisfaction of "doing good" or maintaining community respect, and emotional deprivation, such as that resulting from the social revulsion triggered by immoral conduct. This conjuncture of Bentham's utilitarian and Devlin's morality principles reflects their common premise that the aggregate psyche or sense of the community determines how far laws may reach into the life of the individual. Bentham's utility principle is simply broader in outlook, extending beyond morality into a range of human choice only minimally associated with ethical and moral considerations. Bentham's sense of the community governs all social actions—determining the varieties of bread men may eat as well as the persons with whom they sleep.

Contrasted with the Devlin-Bentham resort to a community consensus is the view that criminal laws must be predicated not only on whether conduct is moral or immoral, beneficial or injurious, but also on whom an incident affects. Activities affecting only willful and intelligent participants are beyond the perimeter of government control, but when they affect others, society may evaluate and then prohibit those activities found injurious. In this sense, the "harm to others" principle establishes a zone of privacy in which an individual's thoughts and deeds are controlled by his conscience alone.[22]

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19. DEVLIN at 18. A well reasoned critique of Devlin's use of "morality" suggests that:

> [T]he principles of democracy we follow do not call for the enforcement of consensus, for the belief that prejudices, personal aversions and rationalizations do not justify restricting another's freedom itself occupies a critical and fundamental position in our popular morality.

Dworkin, *Lord Devlin and the Enforcement of Morals*, 75 YALE L.J. 986, 1001 (1966).

20. Comment, *Morals and the Criminal Law*, 71 YALE L.J. 662 (1962).

21. J. BENTHAM, THEORY OF LEGISLATION 2 (Hildreth ed. 1876).

22. An extended analysis of the harm to others principle can be found in Comment, *Private Consensual Adult Behavior: The Requirement of Harm to Others in the Enforcement of Morality*, 14 U.C.L.A. L. REV. 581 (1967).

The principle that individuals have a sphere of action limitable only when other members of society receive injury is attributed to John Stuart Mill who wrote:

> The only purpose for which power can rightfully be exercised over any member of a civilized community against his will is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because in the opinions of others, to do so would be wise or even right.[23]

In modern times, Mill's philosophy has been referred to in the debate over legislation proposed in England[24] and the United States.[25] For example, the famous 1957 *Wolfenden Report,* concerning homosexual offenses and prostitution, observes that the function of law

> [I]s to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others. . . . It is not . . . the function of law to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behavior. . . .[26]

The report concludes:

> Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business.[27]

Neither Mill nor the *Wolfenden Report* advocates that laws totally avoid enforcing morality. Mill's philosophy merely suggests a zone of privacy where individuals may conduct themselves according to their own intelligent judgment as long as they do not adversely affect others who may not approve of the conduct for themselves. Privacy in this context refers to conduct which is closely and intimately related to the individual and his consenting associates, as opposed to privacy in the sense of concealment from others. This distinction is often overlooked, in that some

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23. J. MILL, ON LIBERTY (1859), published in 25 HARVARD CLASSICS 203-04 (1961).

24. COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION, REPORT, CMD. No. 247 (1957) [hereinafter cited as WOLFENDEN REPORT].

25. In 1955, the Reporters of the American Law Institute recommended that "all sexual practices not involving force, adult corruption of minors, or public offense" should be excluded from criminal proscription. MODEL PENAL CODE § 207.5, comment at 277 (Tent. Draft No. 4, 1955). The recommendation was based on the grounds, among others, that,

> No harm to the secular interests of the community is involved in a typical sex practice in private between consenting adult partners. This area of private morals is the distinctive concern of spiritual authorities.

26. WOLFENDEN REPORT at 9-10.

27. *Id.* at 24.

conduct, such as homosexual love-making, may be considered injurious to others when open to public view.[28]

If injury to others determines what conduct falls within the zone of privacy, then the borders of this zone will depend on the factual and value judgments society makes regarding the effect of individual conduct.[29] For crimes like murder and theft, the judgments involved are simple when contrasted with crimes premised on more remote and indirect consequences of individual human behavior. On the other hand the judgments can become more difficult. For example, may unmarried adults be prohibited from having sexual relations because the resulting illegitimate births will burden society? Or may unmarried men be barred from simultaneously living with more than one woman because such cohabitation is an attractive alternative to marriage and invites divorce?

Mill and the *Wolfenden Report* obviously contemplate an immediate and direct injury to non-consenting persons as a prerequisite to criminal sanctions. If, however, as in the two hypotheticals, illegitimate births occur and marriages dissolve, both at the expense of the public purse, society should not be impotent to prohibit the cause of the injury. Such impotency would seem justified only if injury is unestablished or insignificant. Perhaps, then, Mill and the *Wolfenden Report* state a legitimate philosophy, the practical thrust of which is simply to require clear proof of a significant injury before criminal sanctions are imposed. When a criminal law is based on a remote or indirect injury to society, the classical presumption that laws are predicated on sufficient legislative facts[30] should not control.

## III. The Judicial Response: Griswold and Prodigy

For the promotion of public morals, a Connecticut statute of Civil War vintage banned the use of contraceptives.[31] In declaring this pro-

28. As to distasteful public conduct, even Mill concedes,

> [T]here are many acts which, being directly injurious only to the agents themselves, ought not to be legally interdicted, but which, if done publicly, are a violation of good manners, and coming thus within the category of offenses against others, may rightly be prohibited.

J. Mill, On Liberty (1859), quoted in The Utilitarians (1961).

29. The injury required as a prerequisite to criminal sanctions has been defined as "the negation, endangering, or destruction of an individual, group, or state interest which was deemed socially valuable, in harmony with the Constitution." Eser, *The Principle of "Harm" in the Concept of Crime: A Comparative Analysis of the Criminally Protected Legal Interests*, 4 Duquesne U.L. Rev. 345, 413 (1966).

30. "If under any possible state of facts a statute would be constitutional, 'the existence of that state of facts at the time the law was passed must be assumed.' Rast v. Van Deman & L. Co., 240 U.S. 342, 60 L. Ed. 679, 36 S. Ct. 370[(1916)]." 16 Am. Jur. 2d *Constitutional Law* § 143, at 343 n.19 (1964).

31. [T]he primary objective of the Connecticut statute, as far as could be determined, was to promote public morality by prohibiting the use of extrinsic devises to prevent conception, even within the marital relation. The enactment was, in other words, designed to compel adherence to a purely moral principle.

Emerson, *Nine Justices in Search of a Doctrine*, 64 Mich. L. Rev. 219, 225 (1965).

hibition unconstitutional, *Griswold v. Connecticut*[32] gave birth to the penumbral rights of privacy and repose. The decision in *Griswold* reasons that the specific guarantees in the Bill of Rights have "penumbras, formed by emanations from those guarantees that help to give them life and substance."[33] The Court further elucidated the doctrine of penumbral rights by stating:

> Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secured in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create his own privacy which governments may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[34]

This zone of privacy would seem to be the inner world of private morality and immorality portrayed by Mill and the *Wolfenden Report*; a world into which government may not intrude unless the outside community suffers injury. But while the opinion of the *Griswold* Court meticulously sets forth the inductive process through which the right of privacy is inferred, the contents and scope of this right are virtually undefined. The marital relationship between man and woman is placed "within the zone of privacy created by several fundamental constitutional guarantees,"[35] but there is neither an enumeration of other rights falling within the zone nor the suggestion of criteria for determining inclusion of other rights within this constitutionally protected area.

Also notable is the failure of the Court in *Griswold* to describe the interplay between the zone of privacy and statutes which infringe upon it. There are four tests which could have determined the justification for Connecticut's intrusion into the marital bedroom. First, the zone of privacy may classify rights which are "absolute" and not subject to infringement.[36] Second, under a balancing test, the protected relationship or activities may have outweighed the interest Connecticut sought to promote through its legislation.[37] Third, while the interest of the state may have been

32. 381 U.S. 479 (1965).

33. *Id.* at 484.

34. *Id.*

35. *Id.* at 485.

36. The absolute right test is formulated generally in a first amendment context. *See* Meiklejohn, *The First Amendment as an Absolute*, 1961 SUP. CT. REV. 245.

37. A balancing test was first employed with respect to free speech in American Communications Ass'n v. Douds, 339 U.S. 382, 399 (1950). For comment supporting the test,

compelling, the invalidated statute bore no rational relationship to this interest.[38] Finally, even if the statute did bear a rational relationship to the activity sought to be controlled, this end could have been achieved by a less restrictive alternative, one which did not sacrifice rights within the protected zone.[39]

The concurring opinion by Justice Goldberg suggests that while the right of privacy is less than absolute, it may not be abridged "simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose."[40] Rejecting the "absolute right" and "mere rational connection" formulae, Justice Goldberg reasons that Connecticut should have evidenced a compelling interest in subordinating individual liberty, but failed to do so.[41] The interest it did establish could "be served by a more discriminately tailored statute" which did not sweep unnecessarily broadly and intrude upon the privacy of married couples.[42]

In determining the boundaries of protection, Justice Goldberg states that the necessary inquiry is whether the right involved is of such a character that it cannot be abridged without violating those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."[43] In false prophecy, the right of privacy is then defined in terms of what it is not. The right of privacy in no way interferes with a state's "proper regulation of sexual promiscuity or misconduct." "Adultery, homosexuality and the like are sexual intimacies which the state forbids," but the intimacy of husband and wife "is necessarily an essential and an accepted feature of the institution of marriage," an institution which the state "always and in every age has fostered."[44]

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*see* Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75; for a criticism of the test, *see* Meiklejohn, *The Balancing of Self Preservation Against Political Freedom*, 49 CALIF. L. REV. 4 (1961) and Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962).

38. This test has generally been applied under the equal protection clause of the fourteenth amendment when a legislative classification is challenged as being without rational and substantial relation to the object of the legislation. Generally the "constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective." McGowan v. Maryland, 366 U.S. 420, 425 (1961).

> 39. [E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose.

Aptheker v. Secretary of State, 378 U.S. 500, 508 (1964). *See* Struve, *The Less-Restrictive-Alternative Principle and Economic Due Process*, 80 HARV. L. REV. 1463 (1967); Comment, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464 (1969).

40. Griswold v. Connecticut, 381 U.S. 479, 497 (1965).

41. *Id.*

42. *Id.* at 498.

43. *Id.* at 493. For the suggestion that *Griswold* merely restates the protection afforded "fundamental rights" under the fourteenth amendment *see* Kauper, *Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The Griswold Case*, 64 MICH. L. REV. 235 (1965). Kauper concludes that "far from advancing to a new milepost on the high road to judicial supremacy," *Griswold* "was treading a worn and familiar path." *Id.* at 258.

44. *Id.* at 498-99. Petitioner's counsel apparently was a far more accurate prophet. Ob-

Notwithstanding the suggestion that only sexual relationships approved by the state are within the zone of protection, *Griswold* has spawned significant decisions which appear to have judicially enacted the *Wolfenden Report* recommendations as to sexual conduct by consenting adults in private. In *Cotner v. Henry*,[45] wherein a husband had been convicted of committing sodomy with his wife, the court declares that the "import of the *Griswold* decision is that private, consensual, marital relations are protected from regulation by the state through the use of a criminal penalty."[46] The right of privacy is thus extended to socially disapproved as well as approved intimacies in the marital bedroom. Further, in *People v. Roberts*,[47] the right of privacy is extended beyond the marital bedroom, and homosexual relations between consenting male adults in private, including sodomy, are placed beyond state criminal sanctions.

In each of these extensions of *Griswold*, the critical factor was the state's failure to clearly demonstrate an overriding interest in preventing the relations it condemned. The significance of the *Cotner* and *Roberts* decisions could not be fully amplified, however, until their rationale was applied in a case where the state sought to demonstrate a substantial public interest underlying its criminal statute, thereby forcing the court to gauge the actual "weight" of the right of privacy when balanced against other interests.

*People v. Belous*[48] applies the right of privacy to still another context. A medical doctor had been convicted of abortion and conspiracy to commit an abortion. The young woman whose pregnancy was aborted was unmarried at the time. Without hesitation, the court concludes that a woman's right to life and to choose whether to bear children "follows from the Supreme Court's and this court's repeated acknowledgment of a 'right of privacy' or 'liberty' in matters related to marriage, family and sex."[49] The decisive question, therefore, was "not whether such rights exist, but whether the state has a compelling interest in the regulation of a subject which is within the police powers of the state."[50] The statute

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serving that "constitutional doctrines have a way of expanding beyond the boundaries of the original case," he predicted that the right of privacy would be applied to sexual conduct outside the marital relation, abortion laws, and electronic eavesdropping. Emerson, *Nine Justices in Search of a Doctrine*, 64 MICH. L. REV. 219 (1965).

45. 394 F.2d 873 (7th Cir. 1968).

46. *Id.* at 875; *accord*, Harris v. State, 457 P.2d 638, 648 (Alaska 1969), wherein it is volunteered that if

> the case at bar concerned private, consensual conduct with no visible impact upon other persons, at least some of us might perceive a right to privacy claim as one of the penumbral emanations of the Bill of Rights.

47. 256 Cal. App. 2d 488, 64 Cal. Rptr. 70 (1967); *see also* Norton v. Macy, 417 F.2d 1161 (D.C. Cir. 1969).

48. 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969).

49. *Id.* at 963, 458 P.2d at 199, 80 Cal. Rptr. at 359.

50. *Id.* at 964, 458 P.2d at 200, 80 Cal. Rptr. at 360.

was invalidated because it could not be construed in a manner that reflected a sufficiently compelling state interest.

While the right in *Belous* to prevent birth after conception might be the natural corollary of the right in *Griswold* to prevent birth before conception, the zone of privacy is substantial if it includes the right to expunge the consequences of illegal sexual activity notwithstanding the strong interest society has heretofore shown in unborn children. *Belous* does not shirk the judicial burden of balancing the competing interests of society and the individual. On the contrary, the opinion interpolated an immense volume of historical and sociological data.

The decisional process required in *Belous* inevitably precipitates a major criticism of the right of privacy. If conscienciously represented, a state will introduce a mass of factual data supporting the "injuries" its criminal laws seek to prevent. The judicial forum, handicapped by limitations of time, personnel, and rules of procedure, is hardly an ideal forum to sift evidence and determine the factual basis for any statute.[51] For this very reason, courts have traditionally presumed the validity of the legislative facts on which legislation is predicated.[52]

However, legal and constitutional rights never exist in a vacuum. Legislative findings of fact can determine the existence of a valid state "interest" warranting the subordination of individual interests. If accepted without scrutiny by the judiciary, legislative findings of fact can turn basic rights into mere shadows. If courts are to protect individual liberties from state encroachment, whether in the area of civil rights or personal rights, they must independently evaluate data with reference to the society in which they function.[53] The resources of the state are greater than that of the individual, and the evil resulting from the infringement of a personal liberty is obvious. It is, therefore, fundamentally fair that the state bear the burden of proving conclusively that the infringement imposed is required by a compelling interest which cannot be safeguarded by less restrictive procedures.

Reasserting the doctrine of privacy in the context of first amendment freedoms, *Stanley v. Georgia*[54] formulates significant guidelines for justifying society's intrusion into the privacy of the individual. Stanley had been convicted under a Georgia statute prohibiting the mere posses-

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51. With respect to balancing competing interests, "the factual determinations involved are enormously difficult and time consuming, and quite unsuitable for the judicial process." Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 913 (1963). One commentator concludes that the Supreme Court has implicitly conceded "it is not qualified to choose between various means" when applying a less restrictive alternative test. Comment, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464, 474 (1969). *Cf.* C. MILLER, THE SUPREME COURT AND THE USES OF HISTORY 17-20 (1969), which notes the Supreme Court's increasing use of "social evidence."

52. *See* note 30 *supra* and accompanying text.

53. For the view that the Supreme Court should take evidence in the form of "legislative facts", *see* Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75.

54. 394 U.S. 557 (1969).

sion of obscene material found in his bedroom desk. In a setting of "a prosecution for mere possession of printed or filmed matter in the privacy of a person's own home," the Court says the right to receive information and ideas "takes on an added dimension, for also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy."[55]

> The makers of our Constitution undertook to secure conditions favorable to the support of happiness. They recognized the significance of man's spiritual nature, of his feeling and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued of civilized man.[56]

Confronted by these "traditional notions of individual liberty," Georgia launched a three-pronged defense of its statute. First, the State asserted the right to protect the individual's mind from the effects of obscenity.[57] This asserted right was found to be wholly inconsistent with the philosophy of the first amendment, which precludes government from controlling "the moral content of a person's thoughts."[58] The freedom to be moral or immoral, then, short of actual deeds, is a liberty guaranteed by the Constitution.

As a second defense, Georgia asserted that exposure to obscenity may lead to deviant sexual behavior or crimes of violence. The Court doubted the empirical basis of this assertion and, more importantly, concluded that a state

> may no more prohibit mere possession of obscenity on the ground that it may lead to anti-social conduct than it may prohibit the possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits.[59]

Instead, a "clear and present danger of anti-social conduct"[60] must be shown. This quantum of proof may apply more to the first amendment right to receive information than to the zone of individual liberty acknowledged by the Court, but the required showing is an equally appropriate safeguard against the unnecessary infringement of any of the personal liberties assumed under the "right of privacy." The state should, as a minimum, prove that the possession of any prohibited material "would probably induce its recipients to" anti-social conduct.

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55. *Id.* at 564.
56. *Id.* (quoting from Olmstead v. United States, 277 U.S. 438 (1928)).
57. *Id.* at 565.
58. *Id.*
59. *Id.*
60. *Id.* at 567.

Finally, Georgia maintained that prohibiting possession of obscenity is a necessary incident to statutory schemes prohibiting distribution. Again, the Court doubted the factual basis of the assertion but stated that, even if true, the need to "ease the administration of otherwise valid criminal laws" was deemed an insufficient reason for dispensing with fundamental liberties.[61]

By acknowledging a right of privacy that applies to substantive law as well as criminal procedure, *Griswold* and its prodigy have fortified a sphere of individual liberty against governmental intrusion, unless the intrusion is based on a clear showing of a "compelling interest" that cannot be accomplished with "less restrictive" laws. More than the mere assertion that anti-social conduct may result is required. The timeworn claims of difficulties in enforcing other laws or of safeguarding an individual against some purely moral depravity carry little weight, and a mere "rational connection" between a law and social welfare will not justify infringement of protected liberties.

While neither the full content nor specific criteria for determining inclusion within the zone of privacy has been disclosed, *Griswold* and prodigy follow closely the precepts of Mill and the *Wolfenden Report* that power can rightfully be exercised over any member of a civilized community against his will only to prevent harm to others. When individual thought or action does not discernibly injure others, it is to be left unfettered.

As a limitation on the power of criminal laws to regulate an individual's private affairs, the right of privacy is in its infancy. Its growth into maturity can only be predicted by decisions which are currently too scarce to allow particularization concerning future development. Potentially, however, the privacy doctrine can structure a dramatic departure from the present relationships between the individual and his government, legitimizing and expanding a new world of personal freedom. Some of the more probable expansions, as well as limitations, of the doctrine are explored next.

## IV. The Brave New World

The frontier relationships between man and government necessarily evolve with the society in which they both co-exist. As sexual permissiveness (some would say license) expands, the friction generated in this area by hostile contacts between man and government will decline simply because the number of contacts will decrease. But new frictions will arise, and in some instances, the old frictions will accelerate in the frenzy of their dissolution.

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61. *Id.* at 568. While *Stanley* prevents prosecution of a private individual for possession of obscene material in his home, its protection does not extend to possession of obscene materials by a vendor. *Mitchum v. State*, 251 So.2d 298, 302 (Fla. 1st Dist. 1971), *citing*, *United States v. Thirty Seven Photographs*, 402 U.S. 363 (1971) and *United States v. Ridel*, 402 U.S. 351 (1971).

Searching for an identity that is uniquely theirs, or perhaps merely reaching out for new experiences, some Americans, attempting to assert a new life-style, ask if they may wear their hair long,[62] use hallucinogenics, such as marijuana,[63] and, possibly, live in a communal group.[64] While such questions might appear more appropriately directed to their parental or peer groups, the law, nonetheless, has increasingly become their final arbiter.

The right of privacy derives significance as a constitutional doctrine because of a continuing relevance to individual freedom in creating a life-style. Long hair, hallucinogenics, communal relationships, and the choices they involve illustrate this relevancy. These phenomena are not selected because of their particular immediacy to vital social issues but, rather, because they contain ingredients important to the doctrinal development of privacy.

### A. *The Long Hair Decisions*[65]

The right of privacy has long been treated as almost the right of concealment. In tort law, privacy has involved the individual's right to keep information about himself and his family from becoming public knowledge.[66] In criminal procedure, the fourth and fifth amendments have concerned the individual's right to withhold information and evidence from agents of the government.[67] Even when applied to substantive criminal laws, the elements of privacy and concealment have been the primary characterization. Images of a closed-door doctrine are conjured

62. [H]airstyles have altered from time to time throughout the ages. Samson's locks symbolically signified his virility. Many of the Founding Fathers of this country wore wigs. President Lincoln grew a beard at the suggestion of a juvenile female admirer. Chief Justice Hughes' beard furnished the model for the frieze over the portico of the Supreme Court of the United States proclaiming 'equal justice under law'. Today many of both the younger and older generations have avoided the increased cost of barbering by allowing their locks or burnsides to grow to greater lengths than when a haircut cost a quarter of a dollar.

Richards v. Thurston, 304 F. Supp. 449, 451 (D. Mass. 1969).

63. There "are 500,000 to 1,000,000 'regular' marijuana smokers in the United States and 3,000,000 to 5,000,000 'occasional' users." *See* J. SIMMONS (ED.), MARIJUANA: MYTHS AND REALITIES 232 (1967)." Cited in Leary v. United States, 395 U.S. 6 (1969).

64. *See* notes 102 and 109 *infra*.

65. There is a real and growing violence in the society about these seemingly innocent and personal matters of costume . . . [The] greatest internal conflict in America in the late 1960's [will be between] the people with long hair and the people with short hair.

Wakefield, *The War in Home*, 224 ATLANTIC, October, 1969, at 119, 120. The earliest "long hair" decision on record can be found in Samson v. Delilah, *Judges* 16:4-28; this case contains an excellent discussion of the consequences of a haircut.

66. *See* Time, Inc. v. Hill, 385 U.S. 374 (1967), noted 81 HARV. L. REV. 169 (1967); *cf.* Note, *The Right to be Let Alone*, 18 U. FLA. L. REV. 597 (1965).

67. One commentator declares:

[T]he right to privacy now means nothing more than a diminishing protection against unreasonable searches and seizures. The Fourth Amendment, combined with the protection against self-incrimination in the Fifth Amendment, furnishes only modest protection of the right to privacy.

Beaney, *The Constitutional Right to Privacy in the Supreme Court*, 1962 SUP. CT. REV 212, 251.

by the repeated references to the marital bedroom in *Griswold*. This background raises the inevitable question: is there a right of privacy in a public context?

The right of privacy is formulated from the premise that laws can prohibit only that individual conduct which is injurious to others. Based on this premise, the right of privacy should protect all non-injurious activity, whether private or public. Of course, some activities are criminally punishable only in a public context;[68] drunken and disorderly conduct, public defecation, and marital intercourse are examples. But, gauged by current mores, these activities are considered injurious to others merely by the fact of exposure.

The recent revolution in men's hair styles has interjected the right of privacy into a public context. A typical incident is described in *Ferrell v. Dallas Independent School District*,[69] where members of a musical combo were denied admittance to a public high school because of their "Beatle style" haircuts. This "no admission with long hair rule" was promulgated because the short hair students showed their dislike for long hair by threatening to cut it, using obscene language, and on occasion, initiating fights. In ensuing litigation, various courts have recognized that whether "hair styles be regarded as evidence of conformity or of individuality, they are one of the most visable examples of personality;"[70] their regulation without "a compelling subordinating interest" would "assault personality and individuality."[71] Notwithstanding the fact that one's hair style is necessarily exposed to public view, courts have therefore placed a student's hairstyle within his right of privacy, and concluded that "until one's appearance carries with it a substantive risk of harm to others, it should be dictated by one's own taste or lack of it."[72]

In *Ferrell*, however, the "no admission with long hair rule" was sustained on the basis that it was fairly calculated to prevent the disorders resulting from the short hair students' adverse reaction to long hair. Whatever the merits of the *Ferrell* decision, this basis for the opinion is surprising. If, as the circuit court acknowledges,[73] the long hair dissenters were exercising a constitutional right, then this right was cur-

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68. Many sexual offenses have historically been predicated on public exposure. Comment, *Private Consensual Homosexual Behavior: A Crime and Its Enforcement*, 70 YALE L.J. 623 (1961). For an entertaining discussion of another aspect of the public exposure concept, *see also* Schmerer, *The Law of Organized Nudism*, 17 U. MIAMI L. REV. 596 (1963).

69. 392 F.2d 697 (5th Cir. 1968).

70. Richards v. Thurston, 304 F. Supp. 449, 451 (D. Mass. 1969).

71. Breen v. Cahl, 296 F. Supp. 702, 706 (W.D. Wis. 1969).

72. Griffin v. Tatum, 300 F. Supp. 60, 62 (M.D. Ala. 1969).

> I suppose that a nation bent on turning out robots might insist that every male have a crew cut and every female wear pigtails. But [this contradicts] the ideas of "life, liberty, and the pursuit of happiness," expressed . . . in the Constitution itself, including of course freedom of expression and a wide zone of privacy.
> Ferrell v. Dallas Independent School Dist., 393 U.S. 856 (1968) (Justice Douglas, dissenting).

73. 392 F.2d 697, 702 (5th Cir. 1968).

tailed because of the likelihood of improper or disorderly action by those who support the status quo. This rule of adverse reaction has been clearly rejected in *Terminiello v. Chicago*, where the right to speak unpopular views was upheld even if it "stirred people to anger, invited public dispute, or brought about a condition of unrest,"[74] and in *United States v. U.S. Klans*, where the "threat of mob violence" was no excuse for the failure of the court to issue an injunction "to protect the constitutional rights of private citizens."[75]

Even the clear and present danger doctrine[76] affords no support for a rule of adverse reaction. If a man yells "fire" in a crowded theater, or incites an aroused and angry mob to violence, the ensuing disorder is a reflex response, as the time and circumstances do not permit calm and dispassionate analysis. The disorder is presumed to be the natural and intended consequence of his words; the injury is to others. This is hardly analogous to an individual expressing his unpopular views or his unorthodox lifestyle in circumstances that are typical to everyday life. Those who react adversely to the individual are not exercising a reflex response that he can be presumed to have intended. The resulting injury is primarily to him. Those who deliberately and improperly engage in such suppression are responsible for the disorder and it is they, not the dissenter, who should be disciplined.

The adverse reaction in *Ferrell* is also distinguishable from the adverse reaction that justifies laws punishing disorderly conduct or public sex acts. In *Ferrell,* the exposure to long hair did not, in itself, injure the short hair students. Only when the short hair students reacted, by starting fights or using obscene language, did disorder result, destroying a suitable classroom atmosphere. To transmogrify language from the law of torts, the short hair students were an "intervening cause" between the long hair and the ultimate injury; they had the "last clear chance" to prevent disorder. In the case of disorderly conduct or lewd and lascivious behavior, the exposure itself to other members of society is the injury. Those who witness such an incident receive the injury. The witnesses do not injure others as was the case in *Ferrell.*

The long hair decisions are important not only because they expose a failure on the part of school officials to justify the infringement of individual freedoms that they have so long imposed at will. In addition, the cases emphasize that young people are entitled to share some of the liberties shielded by every man's right of privacy. As *Tinker v. Des Moines Independent Community School District* observes:

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74. 337 U.S. 1, 5 (1949).

75. 194 F. Supp. 897, 906 (M.D. Ala. 1961).

76. The clear and present danger test was originally formulated by Justice Holmes in *Schenck v. United States,* 249 U.S. 47, 52 (1919), which concerned the limits of free speech.

> The question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.

> In our system, state operated schools may not be enclaves of totalitarianism . . . Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the state must respect, just as they themselves must respect their obligations to the state.[77]

### B. *Splendor in the Grass*

In affirming the right to possess obscene materials in the privacy of the home, *Stanley v. Georgia*[78] reminds us that the makers of our Constitution "undertook to secure conditions favorable to the pursuit of happiness" and to protect Americans in "their beliefs, their thoughts, their emotions and their sensations." Happiness, thoughts, emotions, and sensations are experienced by some as much through marijuana and peyote as through pornographic pictures. If the Constitution protects the possession of one, does it protect possession of them all?

A footnote to the *Stanley* decision[79] disavows any intent to diminish the general power of government to make possession of others items, "such as narcotics, firearms, or stolen goods, a crime." Instead, the holding is said to turn upon the Georgia statute's "infringement of fundamental liberties protected by the First and Fourteenth Amendments." Expressly noted is the fact that no "First Amendment rights are involved in most statutes making mere possession criminal." This caveat could mean that first amendment rights take precedence over all other constitutional rights so that the decision is only applicable in a first amendment context. But if this narrow holding was intended, the reference to "fundamental liberties" and the fourteenth amendment would seem out of place. Moreover, the precedence given the first amendment rights would contradict the Court's express recognition that "also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy" and that the Constitution confers "as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man."[80] Clearly, after suggesting the fundamental importance of the right of privacy, it would be incongruous for the Court to exclude this liberty from the decision's umbrella.

If *Stanley* must be interpreted as incorporating the right of privacy, then its caveat means simply that, notwithstanding any general right of possession, "compelling reasons . . . exist for overriding the right of the individual to possess"[81] narcotics, firearms, or stolen goods. The decision that compelling reasons exist with respect to these items is of little con-

77. 393 U.S. 503, 511 (1969).
78. 394 U.S. 557, 564 (1969).
79. *Id.* at 551 n.11. *Followed in* Borras v. State, 229 So.2d 244 (Fla. 1969).
80. *Id.* at 549.
81. *Id.* at 551 n.11.

sequence, compared to the far more important fact that *Stanley* sets forth clear guidelines for determining, first, when the state may render "mere private possession" a crime and, second, that these guidelines may apply to the possession of non-narcotics, such as marijuana.

By upholding the right of the state to criminally punish the mere possession of marijuana, *Commonwealth v. Leis*[82] is totally at odds with the *Stanley* guidelines. In determining the evils that justified Massachusetts' action, the court in *Leis* reasons that the "smoking of marijuana may cause a state of euphoria and hallucinations or mental confusion and acute panic." In one percent to ten percent of the population, marijuana might trigger short-term "psychotic breaks" which do not, however, "cause permanent psychotic injury or mental deterioration" or induce violent or other destructive behavior.[83] These "evils" involve nothing less than the very core of an individual's mind—his inner feelings, sensations and thoughts. But a free people should be entitled to induce brief and fleeting moments of "euphoria" or even "confusion," "panic," and "hallucinations" through sex, obscene materials, or even legal writings. As *Stanley* proclaims loud and clear: "The makers of our Constitution undertook . . . to protect Americans in their beliefs, their thoughts, their emotions and their sensations."[84] In short, the state "cannot constitutionally premise legislation on the desirability of controlling a person's" mind.[85]

As a second justification for its decision, the *Leis* court reasons that there "is considerable evidence that marihuana does lead some people to the use of more dangerous drugs."[86] If taken literally, this conclusion is a logical non sequiter to what the court expressly acknowledges the evidence to be. As the court explains:

> Essentially the experts do not point to any evidence of a direct, causal relationship between the smoking of marihuana and the use of more dangerous drugs. The studies that do exist discount the once prevalent belief that the smoking of marihuana inevitably leads to the use of more dangerous drugs.[87]

What the court apparently means is that statistics show that of those who use dangerous drugs, some (approximately one-fifth) will have also used marijuana.[88] In this sense, the statement that marijuana "leads to" dangerous drug use does not imply that marijuana "induces" or "causes"

82. 355 Mass. 189, 243 N.E.2d 898 (1969); *accord*, Raines v. State, 225 So.2d 330 (Fla. 1969) (parties stipulated that all transcribed evidence in *Leis* would be admitted in record).

83. 355 Mass. 189, 193, 243 N.E.2d 898, 902 (1969).

84. Stanley v. Georgia, 394 U.S. 557, 564 (1969) (quoting from Olmstead v. United States, 277 U.S. 438, 478 (1928)).

85. *Id.* at 566.

86. Commonwealth v. Leis, 355 Mass. 189, 194, 243 N.E.2d 898, 903 (1969).

87. *Id.* at 194, 243 N.E.2d at 902-03.

88. *Id.* at 194 n.11, 243 N.E.2d at 903 n.11. *See* Ball, Chambers, & Ball, *The Association of Marihuana Smoking with Opiate Addiction in the United States*, 59 J. CRIM. L.C. & P.S. 171 (1968).

such drug use. On this basis, *Leis* contradicts the clear mandate in *Stanley* that the state may not prohibit "mere possession" on the ground that "it may lead to antisocial conduct" but must demonstrate that the prohibited possession would "create a clear and present danger of anti-social conduct or would probably induce its recipients to such conduct."[89]

Finally, the reasoning in *Leis* justifies the prohibition on the basis that smoking marijuana "causes automobile accidents." This conclusion, the court concedes, has never been empirically demonstrated because "there is no accurate, reliable scientific means of determining whether the operator of a motor vehicle has recently smoked marihuana."[90] Instead, the conclusion is deduced from an asserted "agreement among the experts" that marijuana "causes an alteration of sensory perception, a degree of psychomotor discoordination and an inability to concentrate," and that all of these effects of marijuana would interfere with the safe operation of a motor vehicle.[91] While this "agreement among the experts" is highly doubtful, more important is the fact left unstated: unlike alcohol, which induces an exaggerated sense of competency and skill, marijuana induces a euphoric, otherworld feeling that causes its subjects not to undertake activities, such as driving, which require substantial control over real life objects.[92] Because of the passiveness it induces, marijuana is unlikely to be associated with driving and consequent highway accidents. In any event, *Stanley* clearly suggests that an infringement of a constitutional right must be justified by more than unsubstantiated theories as to possible anti-social conduct.

Even when sheltered by the right of privacy, some activities should be subject to state regulation on the showing of an interest less compelling than that required for others. Different activities have different degrees of importance. The right to possess cosmetics, for example, should require a less compelling interest than the right to possess birth control pills. On this basis, the right of privacy should be viewed as a presumption. An activity will be presumed not to injure other members of the community so as to justify its prohibition by the state if the activity is "personal" in nature and common experience reveals no direct and immediately perceivable effect on others. The strength of this presumption varies with the activity claiming the shield of privacy.

Viewing privacy as a presumption the strength of which varies with the activity it shelters, the *Leis* court could well have reasoned that the possession of fifty pounds of marijuana at a public airport in Boston is not very "personal" and, because of the quantities involved, is more likely to affect others. Also unlike sex or literature, marijuana lacks any history of use that would elevate its importance. The right of privacy would thus

89. 394 U.S. 557, 567 (1969).

90. 355 Mass. 189, 194, 243 N.E.2d 898, 903 (1969).

91. *Id.*

92. Weil, Zinberg, & Nelsen, *Clinical and Psychological Effects of Marihuana in Man*, 162 SCIENCE 1234 (1968).

afford a weak presumption to be balanced against the showing of a compelling interest of the state. Without explaining why, however, the court simply determines that marijuana is "not within" a "zone of privacy," and that there is "no right, fundamental or otherwise, to become intoxicated by means of the smoking of marijuana." If activities are to be excluded by judicial intuition or fiat, explanation may be unnecessary, but an apparently arbitrary result will inescapably accompany the lack of coherent criteria for classifying conduct within or without the radius of constitutional protection.

Whether expressed in the language of presumption or of a balancing of interest, some would argue that courts will abdicate their responsibilities to the legislature rather than symbolically weigh a mass of factual and policy ponderables.[93] The case of *People v. Woody*,[94] however, illustrates that individual and public interests can and will be balanced when the possession of marijuana and peyote is constitutionally protected. Notwithstanding the limitations stated in the *Stanley* case, *Woody* approved the assertion of a first amendment right to possess and use peyote by members of the Native American Church, a religious body composed principally of Navajo Indians who "experienced their religion" through peyote consumption. *Woody* rejects the "state's chronicle of harmful consequences," which included a possible correlation between the use of peyote and more harmful drugs as well as an alleged influence on small children. Also repudiated by the court was the power to prohibit an activity because the state "in its asserted omniscience" determines that it "obstructs enlightenment and shackles the Indian to primitive conditions."[95] The handicap to "rigorous enforcement of the [state's] narcotics laws" was conceded if possession by the Navajos was permitted; however, when weighed against free religious expression, this handicap was not found sufficiently compelling.[96] Irrespective of the conclusions reached, *Woody* is important as a reflection of the judicial willingness and capacity to evaluate the data essential to the state's justification for infringing a first amendment right to possess peyote. The same pattern of analysis can be utilized when the "symbolic scale of constitutionality" weighs not freedom of religion, but the right of privacy.

Supporting antecedents to the right of private possession are found in an earlier epoch of our nation's history when the power to outlaw the possession and personal use of intoxicating liquors was challenged.[97] These "alcohol cases" were argued under the "privileges and immunities" clause of the fourteenth amendment which protects only those "privileges

93. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 913 (1963).

94. 61 Cal. 2d 889, 394 P.2d 813, 40 Cal. Rptr. 69 (1964).

95. *Id.* at 894, 394 P.2d at 818, 40 Cal. Rptr. at 74.

96. *Id.* at 897, 394 P.2d at 821, 40 Cal. Rptr. at 77.

97. *Ex parte* Francis, 76 Fla. 304, 79 So. 753 (1918); *Ex parte* Brown, 38 Tex. Crim. 295, 42 S.W. 554 (1897); State v. Gilman, 33 W. Va. 146, 10 S.E. 283 (1889).

and immunities" that are "in their nature fundamental" and "belong of right to the citizens of all free governments."[98] Intoxicating liquors are property and property rights are fundamental, so the "alcohol cases" concluded that possession and use could be prohibited only to promote *public* health, safety, and morals. Accordingly, the prohibition was declared an unjustified abridgement of the privileges and immunities of a citizen, because "the keeping of liquors in his possession by a person, whether for himself or for another . . . can by no possibility injure or affect the health, morals, or safety of the public."[99] While two decades later, *Crane v. Campbell*[100] sustained the right to criminally punish the mere possession of whisky for personal use, it did so to ease "the difficulties always attendant upon [enforcing other laws to] suppress traffic in liquors,"[101] a rationale whose current validity is emphatically rejected by *Stanley*.

### C. *All in the Family*

The traditions, economics, politics, and religious beliefs of America have as their common predicate the monogamous family. A sudden conversion of the family prototype to a polygamous unit would require drastic revision of every detail of the nation's life-style. The type of automobiles we drive and the homes we build, our dining arrangements, dating patterns, the allocation of work, and the multi-numerous facets of everyday life would all be radically altered.

While the adaption of a monogamous family to a polygamous culture is an imaginary occurrence, the converse is a realty. Thousands of American citizens, for reasons of religion or conscience, have chosen an unorthodox family unit, the communal family. Living in plural households are over 30,000 men, women, and children[102] of Fundamentalist Mormon faith,[103] whose polygamous relationships subject them to punishment under national[104] and state laws[105] and excommunication from the Mother Church.[106] For less than purely religious reasons, but in an

98. State v. Gilman, 33 W. Va. 146, 147, 10 S.E. 283, 284 (1889).

99. *Id.*

100. 245 U.S. 304 (1917).

101. *Id.* at 307.

102. William M. Rogers, former Special Assistant to State Attorney General, Utah, reported in *Husbands With More Than One Wife*, LADIES HOME J., June, 1967, at 78.

103. Fundamentalist Mormons "not only believe in polygamy; unlike other Mormons, they practice it." Cleveland v. United States, 329 U.S. 14, 16 (1946).

104. *See* note 111 *infra*.

105. 10 AM. JUR. 2d *Bigamy* § 2 (1962).

106. In 1890, the President of the Church issued what has been popularly known as the "Manifesto," which renounced the doctrine of bigamy and polygamy. The Manifesto was accepted by the United States Government and was a precondition to the government's proclamation of amnesty and pardon to all Mormons who practiced polygamy prior to November 1, 1890. *See* Toncray v. Budge, 14 Idaho 621, 654, 96 P. 26, 37 (1908). With respect to the Manifesto, an anonymous Church Elder has remarked: "We believe the manifesto was inspired not by revelation but by political and economic expediency. . . . If it is living God's law or the law of the land, we will live God's law. Polygamy remains a pillar of our faith." *Husbands With More than One Wife, supra* note 102, at 78.

attempt to get closer to God, nature, and the true man, many "flower children" have also formed communal settlements,[107] departing from not only the materialistic society of their parents and peers, but also the equally false atmosphere of the Haight-Ashburys.[108] There are an estimated 500 such communes across the country, with an aggregate population of 10,000.[109] Included in their ranks are not only press-publicized "trippers," but also some highly educated and family-oriented citizens, such as engineers, architects, carpenters, teachers, social workers, auto mechanics, and even policemen. They are all seeking a simpler way of life, emphasizing pride in work done together.[110]

At first blush, the right of privacy would appear to have no application to polygamous and communal families. While the privacy doctrine has been applied to individual acts, such as the acts of possession and "illicit" intercourse, it has never been applied to a series of ongoing relationships such as would characterize a "family" grouping. Nonetheless, stemming from the doctrine's roots in the first and fourteenth amendments, the privacy doctrine has a high degree of relevancy as a limitation upon the government's power to punish immorality per se.

Federal anti-polygamy legislation culminated in 1892 with the passage of the Edmunds Anti-Polygamy Law.[111] The Law punished not only

107. The commune movement is neither a uniquely American nor a recent phenomenon. For a description of communes in Germany and Scandinavia, *see A Berlin Commune is a Big Happy Family (Sometimes)*, N.Y. TIMES, Dec. 1, 1968, § 6 (Magazine), at 52 *et seq.*, and *From Sweden and Denmark: Experiments in Marriage*, LIFE, Aug. 15, 1969, at 38. Establishment of the Brooks Farm Commune in 1841 is discussed in *Thoreau and Hecker: Freeman, Friends, Mystics*, CATHOLIC WORLD, Sept., 1969, at 265. For a basic history of the "flower children," see *"The Hippies,"* HORIZON, Spring, 1968, at 2.

108. *Getting Away From It All Down on the Hog Farm*, NEW REPUBLIC, Feb. 17, 1968, at 16. They "are like people all over the country who are leaving the boiling cauldron of the big city and seeking the space and freedom that is promised in the American dream." *Trouble in Paradise*, RAMPARTS, November 1969, at 23.

> [These] youthful pioneers, unlike the earlier Americans who went into the wilderness to seek their fortunes, are refugees from affluence. . . . They seek in the land, and in one another, meaningful work, mutual love, and spiritual rebirth.

*The Commune Comes to America*, LIFE, July 18, 1969, at 16B.

109. *Years of the Commune*, NEWSWEEK, Aug. 18, 1969, at 89.

> [In the] last five years since the first hippie settlements sprang up in California, the commune movement has spread—first to the Southwest and within the past year, to the colder and more puritanical climates of the Northeast. Houriet, *Life and Death of a Commune Called Oz*, N.Y. TIMES, Feb. 16, 1969 § 6 (Magazine), at 31.

"They live in crashpads, teepees, geodesic domes, and $100,000 converted guest ranches." *Year of the Commune, supra*, at 89.

110. *Trouble in Paradise*, RAMPARTS, Nov., 1969, at 24. This article is an impassioned account of the harassment inflicted on a commune named "Canyon." One incident is worth repeating:

> Canyon residents awoke one morning recently to find . . . twelve deputy sheriffs fully armed and helmeted, three narcotics agents, a dog catcher with a tranquilizer gun, and three buildings inspectors . . . trespassing on their land and entering their homes looking for "illegal structures" and other [building] violations. When they had finished their mission, they had "posted" twenty structures (including a warehouse, a barn, a tree house for children, a chicken coop and a "sculpture").

*Id.* at 27. *Cf. Hippie-Busting by the Narcotics Squad*, NEW REPUBLIC, Feb. 24, 1968, at 19.

111. Act of March 22, 1882, ch. 47, 22 Stat. 30 [hereinafter cited as Edmunds Anti-Polygamy Law]. A small portion of this Act is incorporated in 48 U.S.C. § 1461 (1964).

bigamy,[112] but also cohabitation with more than one woman.[113] The first of the ensuing polygamy cases, *Murphy v. Ramsey*,[114] involved section 8 of the Act, which bars polygamists from voting in territorial elections. The decision turned on the antiquated theory that the

> personal and civil rights of the inhabitants of the Territories are secured to them, as to other citizens, by the principles of constitutional liberty which restrain all the agencies of government . . . [but] their political rights are franchises which they hold as privileges in the legislative discretion of the Congress of the United States.[115]

Indeed, says the Court, it "would be quite competent for the sovereign power to declare that no one but a married person shall be entitled to vote."[116] However, the day has long passed since the Supreme Court has placed the right to vote at the discretion of Congress,[117] and *Murphy*, therefore, is without contemporary application.

*Murphy* also determined, however, that even if there were limitations on congressional discretion, they would not preclude action designed to prepare a territory for entry into the Union. In such a case, "no legislation can be supposed more wholesome" for a territory than that which seeks to establish "the idea of the family as consisting in and springing from the union for life of one man and one woman in the holy state of matrimony." The wholesome quality attained by such legislation is a "reverent morality, which is the source of all beneficent progress in social and political improvements."[118]

This intuitively-felt connection between the morality of monogamy and the social good may have been beyond doubt in the 1880's but it is of questioned validity today.[119] A state cannot, for example, deny welfare payments to a family whose mother is cohabiting with a man who is not her husband.[120] Similarly, a state cannot prohibit an unmar-

112. *Id.* at § 1.

113. *Id.* at § 3.

114. 114 U.S. 47 (1884).

115. *Id.* at 57.

116. *Id.*

117. *See, e.g.*, Baker v. Carr, 369 U.S. 186, 210 (1962), holding that "if discrimination is sufficiently shown, the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights." *See also id.* at 247 (Justice Douglas, concurring), "right to vote in both federal and state elections was protected by the judiciary long before the right received the explicit protection it is now accorded by" federal laws.

118. 114 U.S. 47, 57-58 (1884).

119. In classifying the interstate transportation of Mormon wives as immoral under the Mann Act, Cleveland v. United States, 324 U.S. 14, 18-20 (1946), recently resurrected the language of the Mormon cases. In dissent, Justice Murphy articulately expresses the view that the Mann Act was hardly intended to punish a man who transports a woman who, by the practices of an established church, is his wife. *Id.* at 25-29. Whatever its merits, however, *Cleveland v. United States* is limited to the statutory interpretation of the phrase "immoral purpose," and does not reconsider the constitutional issues raised by the Mormon cases.

120. King v. Smith, 392 U.S. 309 (1968). The majority did not reach the constitutional issue, as they concluded, "Congress has determined that immorality and illegitimacy should

ried woman from recovering for the wrongful death of her illegitimate children.[121] Both limitations recognize that the state's interest in punishing sin and immorality, even to preserve the idea of "one man and one woman in the holy state of matrimony," is not superior to the individual's right to equal protection of the laws. Under the equal protection clause of the fourteenth amendment, sin and immorality are not per se legitimate bases for governmental retribution.[122] When these equal protection decisions are coupled with *Griswold*, which has been construed to condone intercourse without marriage, and *Stanley*, which requires laws to be predicated on more than moral injury to the individual and the possibility of injury to society, *Murphy's* suggestion that laws may punish polygamy on moral grounds alone seems highly tenuous.[123]

There are circumstances, of course, when deviations from monogamy should trigger criminal sanctions. A man with one wife should not marry a second woman who, through deception, believes he is single. Nor should a second marriage be allowed over the objection of the first wife. Here the basis for criminal punishment is the fraud perpetrated on the second wife or the alteration of the marital relationship without the consent of

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be dealt with through rehabilitative measures rather than measures that punish dependent children." *Id.* at 325. *But see* note 123 *infra.*

121. Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968). Louisiana's laws were said to be "based on morals and general welfare because it discourages bringing children into the world out of wedlock." Levy v. Louisiana, 391 U.S. 68, 69 (1968) (a companion case). The Court found "no possible rational basis . . . for assuming that if the natural mother is allowed recovery for the wrongful death of her illegitimate child, the cause of illegitimacy will be served." Glona v. American Guar. & Liab. Ins. Co., *supra* at 75. Without this benefit to the general welfare, the law was based on sin alone, a classification which was an invidious discrimination.

122. Concurring in King v. Smith, 392 U.S. 309, 325 (1969), Justice Douglas maintains that the state's action violated the fourteenth amendment guarantee of equal protection. In his words:

> [The welfare] regulations are aimed at punishing mothers who have nonmarital sexual relations. The economic need of the children, their age, their other means of support, are all irrelevant. The standard is the so-called immorality of the mother. . . . The other day in a comparable situation we held the Equal Protection Clause of the Fourteenth Amendment barred discrimination against illegitimate children. We held that they cannot be denied a cause of action because they were conceived in "sin," that the making of such a disqualification was an invidious discrimination. Levy v. Louisiana. . . . I would think precisely the same result should be reached here. I would say that the immorality of the mother has no rational connection with the need of her children under any welfare program.

123. A communal family, whether a hippie settlement or a Mormon household, is not a casual act that can easily escape public notice. To some, the "establishment or maintenance of polygamous households is a notorious example of promiscuity, a public disturbance and an annoyance." Cleveland v. United States, 329 U.S. 14, 19 (1946). If the law can punish a man who is drunk on the street, can it not punish such a house of "immorality?" A man can be drunk at home or in his club, and he can drink more moderately in other public places; prohibiting drunkness on a public street is a small limitation when there are reasonable alternatives. A communal family can either live together—or it can dissolve. There are no alternatives. The disorder a drunk on the street causes is generally viewed as immediately disturbing by way of his sounds or presence. A polygamous household is disturbing in the sense that, as a concept, members of our society cannot tolerate it. Our country values toleration. There is, therefore, no real comparison between laws that take drunks off our streets and those which banish the communal family from our country.

the first wife, not the immorality of polygamy. If children are demonstrably neglected or a family impoverished because of polygamy, this too could be a rational basis for prohibiting the practice. Theoretically, however, this same prohibition would be applicable to a monogamous relationship, where child neglect and poverty also exist.[124]

Any defense of the communal family based on the right of privacy, even when plausible first amendment rights are asserted, might appear foredoomed because of the unanimous condemnation of polygamy by the Supreme Court.[125] In *Reynolds v. United States*,[126] for example, a Mormon asserted first amendment protection for the exercise of his religious beliefs, which sanctioned bigamy. The free exercise clause of the first amendment was held to protect his religious beliefs but not his actions. This belief-action dichotomy, however, is clearly diminished by the decision in *Sherbert v. Verner*,[127] which requires state regulation of "conduct or actions" prompted by religious principles to be "justified by a 'compelling state interest.' " This is the same standard now applied to the right of privacy.

## V. CONCLUSION

The greatest misfortunes befalling the right of privacy as a constitutional doctrine are its name and birth. The right of privacy is not one right but many rights, some of which have nothing to do with concealment from public view. The right of privacy is the right of the individual to exist and act in accordance with his own conscience, free from governmental interference so long as he does not harm others.

The privacy doctrine was spawned in a decision involving the marital

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124. Child neglect and abuse is such a part of monogamous America that most states have regulated the problem by statute. *See, e.g.*, FLA. STAT. §§ 828.04 and 828.042 (1969). As to the problems of poverty, see the daily edition of any major newspaper.

125. Cleveland v. United States, 329 U.S. 14 (1946); Church of Christ of L.D.S. v. United States, 136 U.S. 1 (1889); Davis v. Beason, 133 U.S. 637 (1889); Murphy v. Ramsey, 114 U.S. 47 (1884); Reynolds v. United States, 98 U.S. 244 (1878).

126. 98 U.S. 244 (1878).

127. 374 U.S. 398, 403 (1963). Apparently realizing a conflict with *Reynolds* and the other Mormon cases, *Sherbert* characterizes them as involving conduct which "posed some substantial threat to public safety, peace or order." This characterization is entirely spurious because nowhere do the Mormon cases cite public safety and order as their premise. More importantly, this characterization fails to specifically include a threat to public morals, which was the primary ground on which the Mormon decisions rested. This omission is probably not an oversight. It may signal the Supreme Court's unwillingness to accept a threat to public morals per se as a justification for state regulation of religiously motivated conduct. *See also* Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development*, 80 HARV. L. REV. 1381, 1403 (1967), for the view that:

> The state is only engaging in its basic functions when it protects life by the law of homicide and property by the law of theft. But when it seeks to protect the aspirational aspects of morality, *i.e.*, those precepts and values designed to improve the quality of the individual's life and to elevate the tone of interpersonal relationships, problems arise. This kind of morality is analogous to religion.

Laws enforcing this type of "morality" may violate the establishment clause of the first amendment.

bedroom where the metaphor of privacy in the sense of closed curtains and drawn blinds was mistaken for the doctrine itself. The irony of this misfortune is highlighted by *Richards v. Thurston*, where the court, confronted with the right of high school students to wear long hair, reasons that: "[W]e do [not] see the logic of expanding the right of marital privacy identified in Griswold v. Connecticut . . . into a right to go public as one pleases."[128] Notwithstanding this disclaimer, the court explicitly recognizes the real right of privacy in concluding that the Constitution "establishes a sphere of personal liberty for every individual, subject to reasonable intrusions by the state in furtherance of legitimate state interests."[129]

Although described as existing only under the penumbra of the Bill of Rights, the right of privacy is potentially the most important of all our rights. It is the right of every person to be himself and to perform the myriad of daily acts that make up his own identity; the right to wear long hair, use harmless hallucinogenics, to freely choose one's sexual partners, to have or not have children. The assertion of these and similar rights, by whatever label they are designated, is a declaration of the individual's being, which is inevitable in an era so vitally concerned with the quality of life.

128. 424 F.2d 1281, 1283 (1st Cir. 1970).
129. *Id.* at 1284.